Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	
Pursuant to 47 U.S.C. § 160(c) in the	)	WC Docket No. 04-223
Omaha Metropolitan Statistical Area	)	

REPLY COMMENTS OF QWEST CORPORATION

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TABLE OF CONTENTS

Page

SUMMARY

Qwest Corporation is no longer the dominant provider of local exchange services in the Omaha Metropolitan Statistical Area. Practically all of the consumers in Qwest's service area within the Omaha MSA currently have at least one alternative facilities-based provider of local exchange telephone service available to them. As Qwest demonstrated in its Forbearance Petition, a majority of Omaha's residential customers have already switched to an alternative facilities-based local exchange service provider. Qwest has therefore petitioned the Commission to grant it forbearance from the requirements of Section 251(c), certain related requirements of Section 271, and from dominant carrier regulation within Qwest's service area in the Omaha MSA.

In these reply comments, Qwest addresses the criticisms that have been filed by Cox Communications, Inc., AT&T Corp. and several other CLECs and CLEC advocacy groups concerning Qwest's Petition. It is not surprising that the CLECs criticize Qwest's data showing that the Omaha MSA's retail market is competitive. What is surprising, however, is that the CLECs have asserted that Qwest's position in the Omaha MSA's retail market is irrelevant, since the true underlying measure of whether a market is "competitive" is whether the CLECs have access to the ILEC's network on a wholesale basis. The CLECs contend that the Omaha MSA's wholesale market is not yet sufficiently competitive and that it is not yet appropriate for the Commission to grant Qwest forbearance. While these claims by the CLECs are creative, Qwest demonstrates that they are incorrect.

Qwest's focus on the retail market is appropriate. Contrary to the claims of the CLECs, the availability of wholesale ILEC services and network elements is <u>not</u> the test for whether forbearance is justified. As Qwest demonstrates, the true test of both market power and the

public interest is consumer choice based on retail competition. Similarly, Qwest also demonstrates that the proper focus of the Commission's forbearance analysis under Section 10 should be end-user customers, not resellers and middlemen. The 1996 Act envisions that so long as ILEC natural monopoly residue impairs competition in certain services, ILEC wholesale services (by way of UNEs) will be made available to CLECs pursuant to Sections 251(c) and 271. Once a market has become competitive, however, and an ILEC's monopoly power ended, Sections 10(a) and 10(d) of the 1996 Act specifically provide that the Commission may lift its regulatory obligations. In doing this, the 1996 Act does not place CLEC welfare ahead of consumer welfare, however.

Qwest also stresses that the claims by the CLECs that Qwest will deny them access to its services and facilities if forbearance is granted are entirely false. This is simply not Qwest's intention, and it is clear that denying access to CLECs would not make financial sense in the face of facilities-based competitors, such as those in the Omaha MSA.

Separately, the CLECs contend that the Commission cannot forbear from any provision of Section 251(c) or 271 because it has not yet determined that their requirements have been "fully implemented." The CLECs also assert that the Commission may not forbear from Sections 251(c) and 271 at all, since such forbearance would have the effect of impermissibly "limiting" the statute under Section 271(d)(4). These arguments are unfounded. As Qwest shows in its reply comments, Qwest has implemented the Section 271(c)(2)(B) competitive checklist throughout its 14-state service territory -- as the Commission specifically found when it authorized Qwest to re-enter the interexchange market pursuant to Section 271. The result of this is that the local exchange market in Nebraska and Iowa, including the Omaha MSA, is now fully open to competition. No separate and duplicative proceeding is necessary in order to prove this yet again. It is correspondingly clear that the Commission may exercise its forbearance authority on this basis without fear of "limiting" the provisions of Sections 251(c) and 271 not only because it has determined that Sections 251(c) and 271 are fully implemented, but also because Section 10(d) of the 1996 Act specifically permits the Commission to forbear from these requirements once it has made this determination.

Qwest also demonstrates at length and in detail that the market definitions and competitive data presented in its Petition are valid, and that Qwest does in fact face substantial and direct competition from a variety of wireline, wireless and VoIP-based service providers. With its response, Qwest includes a supplementary economic analysis prepared by Strategic Policy Research that rebuts the CLECs' claims that Qwest is still a dominant carrier in the Omaha MSA. Qwest also points out that the CLECs have not offered competitive data of their own to rebut the information in Qwest's Petition, even though this data is uniquely within the CLECs' control. Until the CLECs provide this data, the Commission should consider the CLECs' assertions to be unsubstantiated, and should not permit these claims to repudiate the concrete information that Qwest has assembled and placed in the record.

The facts of Qwest's forbearance request remain simple, notwithstanding the deliberate and concerted efforts by the CLEC to muddy the waters. Qwest has demonstrated that it is subject to intense competition in the Omaha MSA's local exchange market, and that Qwest no longer enjoys market power within the wire centers that it serves. The law is equally simple: the retail competition that Qwest faces in the Omaha MSA is overwhelming evidence that Qwest is entitled to forbearance from the federal regulations as requested herein, which are not intended to be applicable to a non-dominant carrier and which should not be applicable to Qwest any longer.

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REPLY COMMENTS OF QWEST CORPORATION

Qwest Corporation ("Qwest"), through counsel, submits these reply comments in response to the initial comments and oppositions that were submitted in response to Qwest's June 21, 2004 Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area by, among others, Cox Communications, Inc. ("Cox"), AT&T Corp. ("AT&T") and several other competitive local exchange carriers ("CLECs"), as well as CompTel/ASCENT ("CompTel"), the Alliance for Local Telecommunications Services ("ALTS"), the Iowa Utilities Board ("IUB"), Commissioner Gerald L. Vap ("Vap Letter") of the Nebraska Public Service Commission ("Nebraska PSC"), and the Independent Telephone and Telecommunications Alliance ("ITTA").

I. INTRODUCTION

Qwest finds itself in an unusual position. It is no longer the dominant provider of local exchange services in the Omaha Metropolitan Statistical Area ("Omaha MSA"). Practically all subscribers in the Omaha MSA currently have at least one alternative facilities-based provider of local exchange telephone service available to them and, in fact, a majority of Omaha's residential customers have already switched to an alternative facilities-based local exchange service provider. Yet the CLECs and their advocacy groups -- remarkably, including the Omaha MSA's dominant telecom provider itself -- proclaim that the competitive state of the Omaha MSA's retail market is not what it seems, and is in any case irrelevant. The CLECs also assert that not only is it in the public interest to continue regulating Qwest as a dominant carrier, it is legally required that the Federal Communications Commission ("Commission") continue to regulate Qwest this way, just as if nothing has changed.

The arguments in favor of this astonishing position are varied, but on scrutiny they devolve to a simple proposition: that the Commission should continue to regulate Qwest as a natural monopoly in all of its services until multiple alternative suppliers of wholesale service are established in the Omaha MSA, using exactly the same technology that Qwest currently uses to provide such service, and each of these competitors can reach all of the customers currently served by Qwest with that same technology. In making this argument, the CLECs ask that the Commission: 1) ignore the fact that Qwest is not even a majority local exchange provider in much of the Omaha MSA; 2) ignore altogether new technologies which are rapidly supplementing and supplanting current circuit switched technology; and 3) ignore the economics of competition and the legal framework which incorporates those concepts. The Commission cannot do this.

It is also important to note that for all the vehemence of their filings, the CLECs have generally misstated both the facts and the law in opposing Qwest's Petition. In this reply, Qwest seeks to straighten the record in both areas.

The facts are simple: Qwest is subject to intense competition in the Omaha MSA's local exchange market. The law is equally simple: this competition provides overwhelming evidence that Qwest is entitled to forbearance from the federal regulations as requested in the instant

Petition, which are not intended to be applicable to a non-dominant carrier and which should not be applicable to Qwest any longer. We address these issues in turn.

II. QWEST'S FOCUS ON THE RETAIL MARKET IS CORRECT

The CLECs do more than attack Qwest's competitive data. The CLECs also insist that the Commission should focus its forbearance analysis on the competitiveness of the wholesale market in the Omaha MSA rather than the retail marketplace, as Qwest has largely done in its Petition.[1] The CLECs then go further, and claim that that the Commission should focus on whether the CLECs will experience "impairment" in the wholesale market, using an analysis borrowed from Section 251(d)(2)(B). Lastly, the CLECs contend that Qwest has not "fully implemented" Sections 251(c) and 271, and that forbearance from their requirements is actually impossible. None of these arguments has any merit. The retail telecommunications market in the Omaha MSA is the proper focus of the Commission's analysis under Section 10(a), and Qwest has fully demonstrated that forbearance is justified based on its actual position within the retail market (as well as by Qwest's full implementation of Sections 251(c) and 271).

A. The Retail Market, Not The Wholesale Market, Is The Proper Focus Of The Commission's Forbearance Analysis

The CLECs claim that the ultimate purpose of the Telecommunications Act of 1996 ("1996 Act") was to create a friendly wholesale market for CLECs rather than to promote consumer welfare through competition.[2] The CLECs also contend the true underlying measure of whether a market is "competitive" is whether the CLECs have access to the incumbent local exchange carrier's ("ILECs") network and services.[3] Proceeding along these lines, the CLECs

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[1] *See* AT&T at 3, 5-6, 11-12, 14-17, 23-35; Cox at 8, 13-15; MCI at 3, 6, 7; Sprint at 2, 7-11, 16-18; McLeod at 1-2, 4, 8, 9-10; CompTel at 10-14; ALTS at 1-11.

[2] *Id.*

[3] *Id.*

further claim that Qwest has failed to show that its competitors will not be "impaired" without access to Qwest's unbundled network elements ("UNEs"), services and network, and that Section 10 forbearance cannot be granted without such an impairment analysis.[4]

These arguments are not accurate. First, even if a Section 251(d)(2)(B) impairment analysis was the appropriate legal test in examining a forbearance petition, the CLECs are re-asserting a policy argument that the Commission has already rejected. When introducing the "necessary" and "impair" standards in the *UNE Remand Order*, the Commission rejected the view that the 1996 Act guarantees CLECs the existence of an underlying wholesale carrier's carrier in perpetuity.[5] The right to wholesale network elements exists only so long as the impairment test is met for a particular UNE, but it does not extend beyond that. Once true facilities-based competition has entered a market, CLECs are no longer guaranteed that they can rely on ILEC wholesale services instead of choosing among other competitive options. The CLECs are confusing the 1996 Act's focus on protecting consumers and promoting competition with an erroneous claim that the law was designed to protect and promote an individual group of <u>competitors</u> (*i.e.*, the CLECs themselves) at the expense of consumers and competition.

It is also clear that the proper focus of a forbearance analysis under Section 10(a) is on the <u>retail</u> market and on the level of competition available to consumers. In its past decisions, the Commission has always judged the competitiveness of markets from the consumer

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[4] *Id.*

[5] *See, e.g.,* In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3727 ¶ 56 (1999) ("*UNE Remand Order*"), *rev'd and remanded in part sub nom. United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, *WorldCom, Inc. v. United States Telecom Ass'n*, 123 S. Ct. 1571 (2003).

perspective, rather than from the special interests of individual carriers competing in that market.[6]

The CLECs restate this argument somewhat differently when they claim that Qwest has not made a showing that there is competition in the wholesale market, and that there is a mismatch between Qwest's data and the type of relief it is seeking.[7] Lastly, the CLECs assert that the Commission is not permitted to grant Qwest forbearance from Sections 251(c) and 271 -- notwithstanding the specific allowance for this in Section 10(d) of the 1996 Act -- since Qwest's unbundling obligations are supposed to be "ongoing" and since forbearance would "limit" these requirements, and they would no longer be "fully implemented" the moment that forbearance is granted.[8]

Regardless of how the CLECs present their claim, the availability of wholesale ILEC services and network elements is <u>not</u> the test for whether forbearance is justified. As discussed above, the true test of both market power and the public interest has always been consumer choice based on <u>retail</u> competition, and it should remain so. The 1996 Act envisions that, so long as an ILEC natural monopoly residue impairs competition in certain services, ILEC wholesale services (by way of UNEs and discounted retail services available for resale) will be made

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6 *See, e.g.*, *WorldCom, Inc. v. FCC*, 238 F.3d 449, 458 (2001). Ironically, in that case, the CLECs argued that the Commission's pricing flexibility decision was erroneous because the Commission had failed to use the consumer-based market share analysis that the Commission used when granting AT&T forbearance in the interexchange market, and which Qwest is once again employing here.

7 *See* AT&T at 3, 5-6, 11-12, 14-17, 23-35; Cox at 8, 13-15; MCI at 3, 6, 7; Sprint at 2, 7-11, 16-18; McLeod at 1-2, 4, 8, 9-10; CompTel at 10-14; ALTS at 1-11.

8 *See* Sprint at 3-6; AT&T at 23-29; Cox at 23-30; CompTel at 6-7; ALTS at 4. The very fact that Section 10(d) is included in the 1996 Act in the first place is one illustration of the absurdity of this contention, in which the statute is literally self-defeating.

available to CLECs. The 1996 Act does not place CLEC welfare ahead of consumer welfare, nor does it guarantee that CLECs will be able to use ILEC facilities at regulated rates forever.

This does not mean, of course, that Qwest's services and facilities will not be available to CLECs if forbearance is granted. ILECs such as Qwest have a very real competition-driven incentive to maximize CLEC use of their networks.[9] As the current competitive situation in the Omaha MSA illustrates, the alternative is complete bypass by facilities-based competitors such as Cox. Qwest is also a common carrier and will remain subject to the same common carrier obligations that govern other carriers (such as Cox). In addition, Qwest remains subject to the jurisdiction of the Nebraska PSC in the offering of its intrastate telecommunications services.

As an overarching matter, it is also clear that since ILECs remain common carriers, their services will be available on a non-discriminatory basis even after petitions such as the Qwest Petition have been granted. But these offerings will be driven by market forces and competition, not by regulation. As the CLECs plainly admit, this is the basis for the impairment test under Section 251 and Section 252 -- and their policy arguments that impairment should be substituted for the relevant Section 10(a) test are simply incorrect.

AT&T also claims, in essence, that it is entitled by statute to not only a set of underlying wholesale services, but that these services must use the identical technology that is currently deployed by the ILECs.[10] This position is not only legally erroneous (there is simply no legal or economic support for it), but it would have the unfortunate side effect of directly stifling new technology. Section 10 of the 1996 Act does not even remotely hint that it is intended to freeze or impede technological advancement in the manner suggested by AT&T -- indeed, the 1996 Act

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[9] *See* attached Supplemental Statement of Strategic Policy Research at 5-6.

[10] *See, e.g.,* AT&T at 11-12, 23-34 (facilities used by other facilities-based carriers in the Omaha MSA are not "cost based" wholesale alternatives to the facilities that Qwest currently provides to CLECs under Sections 251(c) and 271).

is intended to have precisely the opposite consequence.[11] In other words, even taking the CLECs' retail/wholesale argument at face value, the correct question is whether a reasonable carrier can compete with Qwest in the provision of the retail services ultimately provided to end users in a manner that protects the rights of consumers as specified in Section 10, not whether competitors will have the ability to purchase common carrier wholesale circuit switched voice services and use these common carrier facilities to bring service to every potential customer in the relevant geographic market (*i.e.*, without constructing anything at all).

B. The Requirements Of Sections 251(c) And 271 Have Been Fully Implemented Within The Meaning Of Section 10(d)

Various CLECs contend that the Commission cannot forbear under Section 10 from any provision of Section 251(c) or 271 because Section 10(d) prevents such forbearance until those Sections have been "fully implemented."[12] This argument contains a fundamental *non-sequitur,* because Qwest was found to have fully implemented these requirements when Qwest received authority to provide in-region interLATA service in all of its states pursuant to authority granted under Section 271(d)(3) of the 1996 Act.[13]

The 1996 Act precludes the Commission from granting such authority to Qwest until after it has found that Qwest has "fully implemented the competitive checklist in subsection

11 AT&T's recent statements that IP voice will soon supplant circuit switching, and that it will not be investing in current technology, appear to show AT&T doesn't even believe its own rhetoric on this issue.

12 *See* AT&T at 25-29; Cox at 9-10; MCI at 17-20; Sprint at 17-20; McLeod at 10-12; CompTel at 5-8.

13 *See, e.g.,* In the Matter of Application of Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, *Memorandum Opinion and Order*, 17 FCC Rcd 26303 (2002) ("*Qwest Section 271 Order*").

(c)(2)(B) . . ."[14] The Commission was precluded by law from granting Qwest Section 271 interLATA relief until it had found that Sections 251(c) and 271 had been "fully implemented." The grants of Qwest's applications under Section 271 are dispositive of the full implementation issue. While AT&T attempts to argue that the *Qwest Section 271 Order* was not dispositive, and tries to distort the import of the Commission's prior rulings concerning what the term "fully implemented" means, a review of these decisions reveals that AT&T's arguments do not stand up.[15]

Section 10(d) provides that "the Commission may not forbear from applying the requirements of section 251(c) or 271 … until it determines that those requirements have been fully implemented." Congress enacted this limitation to prevent the Commission from using Section 10(a) forbearance as a short cut to full implementation of Sections 251(c) and 271, which would thereby have permitted an ILEC to avoid compliance with those statutory sections altogether. Qwest could not, for example, have sought long distance relief simply by requesting forbearance from Section 271. Instead Qwest was required to "fully implement" Section 271 -- which includes, by definition, full implementation of Section 251(c) as a prerequisite to obtaining Section 271 interLATA relief.

Section 10(d) was fully satisfied once Qwest fully implemented these requirements, and once Qwest obtained interLATA authority pursuant to Section 271. In addition, the public

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14 *See* 47 U.S.C. § 271(d)(3)(A)(i).

15 *See* AT&T at 26-27, *citing* In the Matter of Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, 18 FCC Rcd 23525 (2003) ("*Verizon Forbearance Order*") *and* In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company And Southwestern Bell Communications Services, Inc. d/b/a/ Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas, *Memorandum Opinion and Order*, 15 FCC Rcd 18354 (2000) ("*SBC Section 271 Order*").

interest tests for forbearance outlined in Section 10(a) of the 1996 Act were also satisfied at that point. The Commission's prior findings plainly allow Qwest to seek forbearance relief from either Section 251(c) or Section 271 if Qwest can make the appropriate showings as required under Section 10(a). This does not mean that Sections 251(c) or 271 become dead letters as soon as an ILEC obtains Section 271 authority. It only means that Qwest has the opportunity to make the evidentiary showing required by Section 10(a) of the 1996 Act and, when such a showing having been made, obtain the forbearance relief that the evidence justifies.

Faced with these facts, the CLECs nonetheless urge the Commission to reject Qwest's forbearance requests from Section 251(c) and 271 on the grounds that Qwest still has not fully implemented Sections 251(c) and 271. For example, AT&T misconstrues the standard for finding that Section 271 has been "fully implemented" in its opposition, and tries to tie this claim back to the CLECs' assertion that it is the wholesale market that counts, rather than the retail market. AT&T also claims, that for purposes of forbearance under Section 10, Sections 251(c) and 271 cannot be considered "fully implemented" until "there is ubiquitous availability of durable, cost-based wholesale alternatives to Qwest's bottleneck facilities."[16] But this is not the law, and there is absolutely nothing in either Section 251(c) or 271 that indicates that such a construction is part of full implementation of those statutory sections.

Separately, Cox, AT&T and several other CLECs contend that Qwest is not entitled to rely on the Commission's prior Section 271 finding that Qwest has fully implemented the requirements of Section 251(c), and demand that Qwest owes the Commission a new, separate, and exhaustive demonstration of compliance with Section 271 in order to justify forbearance under Section 10(d). In particular, AT&T claims that the Commission's prior findings that

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16 *See* AT&T at 23-30.

Qwest has fully implemented each of the Section 251(c) checklist items is of no value for a Section 10 analysis, since the Commission's review of Qwest's Section 271 compliance was "limited" and since the Commission was not making a "comprehensive determination" that the requirements of Section 271 had been fully implemented at all.[17]

AT&T's reliance on a recent Commission decision not to forbear from applying the rules which prohibit the Section 272 affiliate of a Bell Operating Company ("BOC") from sharing operating, installation and maintenance ("OI&M") functions either with that BOC or another affiliate of that BOC is misplaced.[18] In particular, AT&T claims that in the *Verizon Forbearance Order*, the Commission expressly rejected the idea that the grant of Section 271 authority to provide interLATA service in a state means that all of the requirements of Section 271 are satisfied.[19] In fact, the Commission in the *Verizon Forbearance Order* found only that Section 271(d)(3)(B), which specifically requires compliance with the requirements of Section 272 will not be deemed "fully implemented" in a particular state until three years after Section 271 authorization has been obtained in that state. This is entirely unrelated to the "competitive checklist" requirements set out in Section 271(c)(2)(B). In the *Verizon Forbearance Order*, the Commission went out of its way to stress that its "analysis here applies only to whether Section 271 is 'fully implemented' with respect to the cross-referenced requirements of section 272, and does not address whether any other part of section 271, *such as the section 271(c) competitive checklist*, is 'fully implemented.'"[20]

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17 *See id.* at 27-28.

18 *See Verizon Forbearance Order*, 18 FCC Rcd 23525.

19 *See* AT&T at 28-29.

20 *See Verizon Forbearance Order*, 18 FCC Rcd at 23529-30 ¶ 6 (emphasis added).

AT&T also contends that under Section 271(d)(4), the Commission may not "limit" the terms of the competitive checklist "by rule" or "otherwise," and warns that this provision bars the Commission from granting Qwest forbearance from the Section 251(c) competitive checklist.[21] This assertion is unfounded and should be rejected. Section 271(d)(4) is aimed at ensuring full implementation of the Section 271(c)(2)(B) competitive checklist *before, but not after,* a Section 271 authorization has been granted. This conclusion makes perfect sense: prior to approving an application, the Commission is foreclosed from modifying or supplanting the list of requirements spelled out in Section 271(c)(2)(B). Once a Section 271 application such as Qwest's has been approved, however, the checklist requirements set out in Section 271(c)(2)(B) have by definition been "fully implemented," as required by Section 271(d)(3)(A)(i). The Commission is not thereafter "limited" in exercising its forbearance authority with respect to those requirements.

AT&T's construction of the statute is further undercut by the fact that Section 10 explicitly authorizes -- indeed <u>requires</u> -- the Commission to exercise its forbearance authority once the relevant requirements of Section 271 have been "fully implemented" and the other conditions of Section 10(a) have been satisfied. That is already the case in Nebraska and Iowa, and there is no plausible reason why Congress would have included a specific reference to forbearance with respect to the provisions of Section 271 if Section 271(d)(4) were in fact intended to prevent the Commission from *ever* exercising such forbearance authority over Sections 251(c) or 271. Congress would not have provided specific forbearance power to the Commission concerning Section 251 if it could not ever be used, which is what the AT&T argument is tantamount to.

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[21] *See* AT&T at 23-24.

In short, Sections 251(c) and 271 have been "fully implemented" in the manner contemplated in Section 10(d) of the 1996 Act. This means that, if Qwest can make a proper Section 10(a) evidentiary showing that meets the public interest test for forbearance, it is entitled to the relief that is otherwise available to it under Section 10(a). AT&T's argument would make Section 10(a) a nullity in most respects to RBOCs, such as Qwest, and should be rejected.

C. Qwest Does Not Have Market Power In The Omaha MSA's Retail Telecommunications Market

Qwest demonstrated in its Petition that due to the level of competition in the Omaha MSA, and due to its comparative decline in market share, Qwest no longer has market power in the Omaha MSA telecommunications market sufficient to justify continuation of the regulations that are the subject of its Petition. Qwest supported this conclusion with the economic analysis performed by Strategic Policy Research, which was included as Exhibit B to its Petition. Strategic Policy Research concluded that due to the high degree of demand elasticity among consumers, the high degree of elasticity in the supply of local exchange services (or their functional equivalent) in the Omaha MSA, the presence of intermodal competitors, and Qwest's reduced market share, Qwest no longer enjoys economic dominance in the Omaha MSA.[22]

The CLECs attack these conclusions, and attempt a three-pronged attack on this demonstration that Qwest lacks market power in the Omaha MSA. The first prong of this attack is the CLECs' criticism of Qwest's competitive data, which is addressed below in Section III. The second prong of this attack is the CLECs' claim that Qwest should have focused on the wholesale services that Qwest provides to them, instead of the retail telecommunications marketplace in the Omaha MSA -- a claim that is also addressed above in Section II.[23]

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[22] *See generally* Qwest Petition at Exhibit B.

[23] *See* AT&T at 6-22; Cox at 5, 13-20.

The third prong of the attack is made by Cox, which contends that Qwest has failed to show a separate "nexus" between the economic data supporting its forbearance request and burdens imposed by each one of the separate regulations from which Qwest is asking forbearance.[24] Cox's argument is spurious and it should be rejected. The nexus/burdens test that Cox is advocating is not contained in Section 10(a) of the 1996 Act, and it has never been adopted by the Commission.[25] Section 10(a) plainly requires that applicants such as Qwest meet a three-part test, not a four-part test, under which the Commission shall forbear from applying a regulation or a provision of the 1996 Act when the Commission determines that: 1) its enforcement is not necessary to ensure that the charges, practices, classifications and regulations employed by a carrier are just and reasonable, and are not unjustly or unreasonably discriminatory; 2) its enforcement is not necessary for the protection of consumers; and 3) that such forbearance is consistent with the public interest.[26] Nowhere is Cox's burdens test or its "nexus" demands implied or specified in these requirements, and this extra test is neither implied nor specified at any other point in the 1996 Act. It should therefore be clear that the 1996 Act does not support this tortured construction at all, and if the Commission using its discretion is considering such a test, it should not.

Cox also asserts that since Qwest has failed to show that the current regulatory requirements are actually burdensome, there is therefore nothing for the Commission to weigh against the benefits to other carriers of continuing the regulations.[27] In essence, Cox is arguing

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[24] *See* Cox at 13-20, 20-40. Presumably, Cox is asking Qwest to prove direct causation for each regulation.

[25] *See, e.g.,* In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd 3271, 3346-50 ¶¶ 138-43 (1995).

[26] *See* 47 U.S.C. § 160(a).

[27] *See* Cox at 13-14.

that in order to justify forbearance, Qwest must place a cost-benefit analysis concerning the benefits to other carriers at the center of its Section 10 analysis. Cox is wrong in making this claim as well. The test for forbearance under Section 10(a) is not how burdensome or odd the regulation might be to other carriers (although no one can contend that the requirement to unbundle one's network at TELRIC prices is not extraordinarily burdensome), but whether the regulation is necessary to protect the public interest. Qwest has clearly met that burden in its Petition.

D. Commissioner Vap's Comments Are Not Material To This Proceeding

On September 9, 2004, Commissioner Gerald L. Vap of the Nebraska PSC filed a letter with the Commission.[28] Commissioner Vap states that he has "deep concerns" that granting Qwest forbearance from Sections 251(c) and 271 at this time will disrupt the Nebraska PSC's regulatory authority and negatively impact the competitiveness of the Omaha MSA's telecommunications market. Commissioner Vap concludes that continued regulation of Qwest is in the public interest so that "rates and practices are just, reasonable and are not unreasonably discriminatory."[29]

With all due respect, Qwest's Petition does not request that any existing Nebraska authority over intrastate services be preempted, and the Nebraska PSC has not set forth any concerns that it is not able to deal with on its own authority. Commissioner Vap's other statements that forbearance is not yet appropriate in the Omaha MSA, and that forbearance would be against the public interest, are similar to the claims made by the CLECs but are not supported by evidence or analysis.

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[28] *See* Vap Letter from Gerald L. Vap, Nebraska PSC, to Marlene H. Dortch, Secretary, FCC, in WC Docket No. 04-223 (Sept. 9, 2004).

[29] *See id.* at 1-2.

E. The Fact That Omaha Is A "Two-State Exchange" Is Irrelevant To Grant Of Qwest's Petition

In a similar vein, Cox's concern that grant of Qwest's Petition might cause "confusion" because the Omaha MSA is a two-state exchange[30] is irrelevant. Qwest has not sought intrastate forbearance in its Petition. Moreover, multistate exchanges have been subject to divided state regulation for many decades, and Cox has posed no meaningful issue as to why the proper state regulators cannot deal with Qwest in the future after its Petition has been granted.[31]

F. Forbearance Is Appropriate At This Time

The test for forbearance set forth in Section 10(a) is firm and straightforward: 1) enforcement of the regulation is not necessary to ensure that Qwest's charges, practices and classifications for its telecommunications services are just, reasonable and non-discriminatory; 2) enforcement of such regulations is not necessary for the protection of consumers; and 3) the requested forbearance will be consistent with the public interest. Qwest is no longer the dominant market player in Omaha, and its Petition demonstrates that it has met all three of these tests. Under the appropriate analysis pursuant to the applicable statutory provision, Qwest is entitled to grant of its Petition.

III. QWEST'S COMPETITIVE DATA IS CORRECT

Cox, AT&T and several other CLECs assault Qwest's demonstrations that the Omaha MSA's market for telecommunications is competitive, and that Qwest no longer enjoys market power.[32] The CLECs criticize Qwest's data, which they assert Qwest has inflated by including inaccurate customer counts and geographic boundaries, as well as by including customers served

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30 *See* Cox at 15.

31 *See* 47 U.S.C. § 221(b).

32 *See* Cox at 13-20; AT&T at 5-22; Sprint at 7-9, 14-17; MCI at 2-3, 16-17; McLeod at 5-10; CompTel at 1-5.

by competitors where Qwest does not provide service. The CLECs also claim that Qwest has not defined the "market" well enough, and they attack Qwest's credibility. Moreover, most of the CLECs miscomprehend the standard of proof, and claim that instead of the massive evidence of retail competition in the entire area covered by its Petition, Qwest really needs to show that the wholesale market would not be "impaired" if it were given relief from the Section 251(c) unbundling requirements. As shown below, an as shown by the attached Supplemental Statement of Strategic Policy Research, the CLECs' criticisms are unfounded.

A. The CLECs Have Failed To Counter Qwest's Information With Competitive Data Of Their Own

As an initial point, all of the CLEC comments have a common defect. The CLECs attack Qwest's data, but they steadfastly refuse to counter Qwest's information by providing data of their own. The CLECs' refusal to put relevant data on the record deprives their arguments of any force because much relevant information as to how the CLECs actually compete in the Omaha MSA and whether, if Qwest's data is incorrect, what the correct information is, is held only by the commenters themselves.

There is a well-tested evidentiary rule that, if a party refuses to disclose relevant evidence within its control in support of a proposition that it makes, it can be presumed that the evidence, if actually adduced, would be adverse to the withholding party.[33] This rule would be especially

[33] This evidentiary notion has been recognized in American jurisprudence since time immemorial. *See Kirby v. Tallmadge*, 160 U.S. 379, 383 (1896) (quoting Mr. Starkie's work on Evidence, vol. 1, p. 54, '"The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice[]'"). *See also*, *e.g.*, *Tendler v. Jaffe*, 203 F.2d 14, 19 (D.C. Cir. 1952), *cert denied*, 346 U.S. 817 (1953) ("There is a further rule that the omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause").

useful here, where CLECs have engaged in a pattern of refusing to provide relevant information in support of their assertions for years.[34] The Commission can legally and logically presume that, if Cox and AT&T and others were to submit the evidence on their actual competitive performance on the record in this case, it would actually demonstrate that their allegations in opposition to Qwest's Petition are erroneous.

B. The Omaha MSA's Boundaries

Cox and AT&T assert that Qwest has erroneously described its service territory in the Omaha MSA, since the MSA consists of eight counties rather than the five counties included in Qwest's description.[35] Cox contends that this ambiguity is a "serious error" that makes it difficult to evaluate the data contained in the rest of Qwest's Petition.

Cox and AT&T are correct that the Omaha MSA presently contains eight counties instead of five. Specifically, in 2003, the Office of Management and Budget increased the boundaries of the Omaha MSA to include three additional counties. Qwest's Petition referred to the MSA definition established in the 2000 Census.

Qwest is only seeking forbearance in the territory that it serves within the Omaha MSA. Forbearance is not needed in other areas. Qwest further agrees that the Commission should use the amended eight-county definition of the MSA's boundaries for this proceeding, since it is more contemporary and more accurate than the 2000 Census definition. For the reasons shown

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34 Qwest noted this same propensity recently in CC Docket Nos. 96-45 and 01-338, and WC Docket No. 04-313, wherein it pointed out, within the context of TELRIC pricing for UNEs, that CLECs have persistently refused to provide meaningful data from their own records to verify their claims of impairment. *See* Response of Qwest Communications International Inc. to Emergency Request of the Association for Local Telecommunications Services, filed Sept. 17, 2004, at 2-3.

35 *See* Cox at 16 *and* AT&T at 7.

below, the differences in the MSA boundaries are in any case immaterial, and do not lead to an overstatement of the level of competition that Qwest faces in its wire centers.

C. Qwest's Service Territory In The Omaha MSA

AT&T asserts that Qwest's Petition is overbroad, whether or not the Omaha MSA contains five counties or eight, since the Omaha MSA includes areas in which Qwest does not provide local service. On this slim basis, AT&T attacks Qwest's credibility, and accuses Qwest of attempting to artificially limit its retail market share by "improperly treating the *entire Omaha MSA* as the relevant geographic market for the assessment of Qwest's local market power" rather than the portion that it serves.[36]

Qwest is not seeking regulatory forbearance in areas of the Omaha MSA where it does not operate. What is more, Qwest's Petition specifically lists the wire centers within the Omaha MSA for which it is seeking forbearance, and Qwest states that the data presented in its Petition relates only to these wire centers.[37]

The focus of Qwest's Petition, and the related competitive evidence Qwest presents, is limited to Qwest's service territory in the following wire centers within the Omaha MSA, broken out by state:

> Nebraska Wire Centers:
> Bennington, Elkhorn-Waterloo, Gretna, Omaha 78th Street, Omaha 84th Street, Omaha 90th Street, Omaha Bellevue, Omaha 135th Street, Omaha Fort Street, Omaha Fowler Street, Omaha 156th Street, Omaha Izard Street, Omaha Douglas, Omaha O Street, and Springfield and Valley.[38]

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36 *See* AT&T at 7-8 (emphasis in original).

37 *See* Petition at Exhibit A, Affidavit of David L. Teitzel ("Teitzel Affidavit") at 2, n.3.

38 *Id.*

Iowa Wire Centers:
Council Bluffs Manawa, Council Bluffs Downtown, Crescent, Glenwood-Mineola, Malvern, Missouri Valley, Neola and Underwood.[39]

Cox asserts that Qwest's "description of the wire centers in the Omaha MSA is itself inaccurate," because the Nebraska PSC consolidated five rate centers into two new rate centers several months ago, as part of Order No. C-2830/PI-66, issued on March 11, 2003.[40] Cox is incorrect. The referenced Nebraska PSC docket focused on a rate center consolidation proposal, rather than a wire center consolidation, and was designed to conserve telephone number resources in Nebraska. Such a rate center consolidation simply makes "all assigned NXXs viable throughout the new rate center" and allows number porting anywhere within the consolidated rate center.[41] The Nebraska PSC did not change the definition of any Nebraska wire center, and this consolidation had no effect whatsoever on wire center definitions. As a result, all of the Qwest wire centers listed as Omaha MSA wire centers that were listed in Qwest's Petition continue to exist.

D. Number Of Households In The Omaha MSA

Cox and AT&T next claim that Qwest has misstated the number of households in the Omaha MSA, and assert that this "misstatement" is an attempt by Qwest to distort the apparent level of competition in the MSA.[42] For example, AT&T asserts that "Qwest claims that Cox has 54,000 more serviceable homes in the Omaha MSA than actually exist," thereby, according to AT&T, artificially inflating the apparent scope of the competitive market. However, this claim is undercut by Cox's (not Qwest's) own public statements. In fact, at page 11 of the Teitzel

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39 *Id.*

40 *See* Cox at 18-19 and footnote 52.

41 *See Order Approving Rate Center Consolidation,* App. No. C-2830/PI-66, Neb. Pub. Serv. Commn, Mar. 11, 2003, p.2.

42 *See* Cox at 17-18 *and* AT&T at 15.

Affidavit, Mr. Teitzel cites data extracted from Cox's May 9, 2002 investor's meeting report showing a total of 295,963 "serviceable" homes in Cox's service territory within the Omaha MSA.[43] These "serviceable" homes are all within Qwest's service territory in the Omaha MSA, and Qwest, through Mr. Teitzel's affidavit, has simply reported the number of households Cox has publicly shown are now capable of receiving Cox's services in that area.

E. Quantification Of Cox Customer Base In The Omaha MSA

Cox maintains that by estimating Cox's current customer base at 148,000, Qwest has overstated Cox's actual current customer base by 30 percent.[44] Qwest has relied exclusively on publicly-available data in estimating the size of the Cox access line base in the Omaha MSA. In its May 9, 2002 investor's conference, which was held over two years ago, Cox reported its "res tel market share" at 26.5% with Qwest's share at 71.4%. In an article in CableWorld published on November 3, 2003 (nearly one year ago), the following statement appeared:

> Cox has been aggressively competing with telephone giant Qwest since 1994 when the telco's predecessor, US WEST launched cable video service in West Omaha. The regional Bell operating company added cable modem service in 1998. At the same time, Cox responded by launching digital cable, high-speed data and local phone service throughout its entire Omaha area footprint. It was a good move for the MSO. Today, 35% of the residents that Cox passes [in Omaha] take local phone service from the MSO. That translates into a 56% penetration rate, or 106,000 phone subscribers - of its basic video customer base of 192,300 customers.

The consumer "take" rate for Cox service, as measured by "homes passed" increased by approximately 10 percent between 2002 and 2003 to 35 percent, and these publicly-reported values exclude any business access lines Cox now serves. As an initial calculation, and

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43 Any households in the Omaha MSA not "serviceable" by Cox would be in addition to this total. In its Petition (at 7), Qwest reported, based on the 2000 U.S. Census, that the Omaha MSA contained 241,721 households. That data vintage is significantly earlier than the vintage of the number of "serviceable" households reported by Cox in the Omaha MSA, and Qwest assumes that Cox has accurately reported the number of households within its service area there.

44 *See* Cox at 17.

accounting for continued growth in residential "take" rate and business lines not addressed in the above percentages, Qwest assumed that 50 percent of the 295,000 Cox "homes passed" now subscribe to Cox telephone service in the Omaha MSA, yielding a quantity of 148,000 residential and business lines.[45] This initial calculation was then tested against other information. Cox's own public statements show this to be a reasonable number. In an article in the Omaha World Herald dated August 10, 2004, which concerned residential white pages directory listings in Omaha, Cox spokeswoman Marcia Cady stated:

> Of Cox's 82,000 residential customers in June 2002, 17 percent didn't want their names in the phone book. This year, with its customer count at 115,000, the number asking for phone number anonymity slipped to 15 percent.

There are two noteworthy items in this statement. First, Cox's self-reported <u>residential</u> customer count has plainly increased by <u>over 40 percent</u> in the two-year period between June 2002 and August 2004. This is a remarkable rate of residential customer growth. Second, Cox's self-reported customer base <u>excludes</u> business customers that Cox serves in the Omaha MSA. In the same article, Cox was reported to have 4,201 business lines in the Omaha area on January 1, 2001 and 12,387 "at the beginning of 2003," a growth rate of 195 percent.[46] It is very reasonable to expect that a year-and-a-half later, Cox now has a substantially greater number of business access lines than the 12,387 it reported at end-of-year 2003. Even under an unlikely assumption that Cox enjoyed <u>no</u> growth in its customer base, Cox's own public statements show that Cox currently serves <u>at least</u> 127,000 residential and business access lines in the Omaha MSA.

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[45] All of the data discussed in Mr. Teitzel's affidavit focuses on access lines, not customers, in quantifying the competitive impacts on Qwest's access line base in the Omaha MSA. *See* Teitzel Affidavit at 3, 4 and 8.

[46] The Cox business access line figure in the Omaha area is reinforced by data reported in the Nebraska PSC's "2003 Annual Report on Telecommunications" issued September 30, 2003. In its report at Table 1, the Nebraska PSC shows Cox Telecom with 12,387 business access lines as of January 1, 2003.

A more likely scenario is that Cox's business access line base has continued to increase. As stated above, Cox's retail business line growth rate between 2001 and 2003 was 195 percent, or 97 percent per year. If it is assumed that this rate of growth in 2004 diminished to 68 percent, a current estimate of Cox business lines in the Omaha MSA would be approximately 21,000. Additionally, if it is assumed that the same proportion of Cox residential customers subscribe to an additional line as do Qwest's residential customers, the 115,000 Cox residential customers reported by Cox subscribe to a total of approximately 127,000 residential access lines. Using public Cox data as a basis, it can reasonably be estimated that Cox has a total of 148,000 residential and business access lines in the Omaha MSA.

While Qwest acknowledges that only Cox knows with precision the exact number of residential and business access lines it serves, Cox's own public statements support Qwest's estimate of Cox access lines served in the Omaha MSA.

Cox contends that the Teitzel Affidavit included with Qwest's Petition stated that "there are 360,000 residential households that are current or potential Cox customers in the defined market" in the Omaha MSA.[47] This is a mischaracterization of Mr. Teitzel's testimony. In his affidavit, Mr. Teitzel cited data extracted from public materials that Cox presented at its May 9, 2002 investor's meeting, which stated that, as of April 30, 2002, Cox's Omaha system was "comprised of 295,863 serviceable homes, 360,000 total residential RGUs and 7,587 commercial customers."[48] Cox's error appears to stem from a reading of footnote 11 of the Teitzel Affidavit defining the term "RGU" as being "potential or current Cox customers within the defined market." Even if Cox is correct (that Cox's number of "serviceable homes" was only 295,863, instead of the RGU count) the difference is irrelevant.

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[47] *See* Cox at 17.

[48] *See* Teitzel Affidavit at 11.

Cox also attacks claims that Qwest does not provide service in six of the 24 wire centers listed at footnote 3 of the Teitzel Affidavit.[49] Although Cox is not specific, it appears that Cox is claiming that Qwest erred by putting these wire centers into Qwest's statistics, even though they are part of the geographic area covered by Qwest's forbearance request. Cox is wrong. Qwest's Petition did <u>not</u> claim that Cox competes with it head-to-head in every one of the wire centers for which it is seeking forbearance. It is unclear how Cox concluded that Qwest was making this assertion, since there is no evidence in Cox's comments that it has compared boundary maps of Qwest's wire centers with Cox's service territory. Also, Exhibit A, Attachment 2 to Mr. Teitzel's affidavit is a map showing where within the Omaha MSA Qwest has confirmed that Cox is offering "triple play" service, which Qwest accomplished by entering street addresses into Cox's website to verify service availability.[50] As shown on this map, Qwest has not maintained that Cox is offering service throughout the Omaha MSA, but that Cox is offering alternative telephone service in the preponderance of Qwest's service territory within the MSA.[51]

Finally, while Qwest has acknowledged that Cox is currently Qwest's most significant competitor in the Omaha MSA,[52] Cox is by no means Qwest's <u>only</u> competitor, and competitors in aggregate are competing with Qwest in all Qwest wire centers in the Omaha MSA. As discussed in more detail below, Qwest faces competition from wireline CLECs, wireless carriers

[49] *See* Cox at 18.

[50] "Triple play" service is defined as areas in which Cox is offering cable television, cable modem and telephone service.

[51] The "triple play" map does not indicate a Cox presence in the Springfield, Neola, Underwood and Malvern wire centers, but shows a limited Cox presence in the Crescent and Missouri Valley wire centers.

[52] This is reinforced by an article in the September 13, 2004 Wall Street Journal, in which the author states, "In Omaha, Neb., cable giant Cox Communications Inc. has toppled the regional Bell and become the area's largest phone company." *See* "Free For All," Wall Street Journal, at P. R1 of the Technology section, September 13, 2004.

and VoIP providers, all of which are present in the Omaha MSA and all of which compete with Qwest throughout its service territory in this market.[53]

F. Line Loss And Competitive Data

The CLECs criticize Qwest's data that correlates its line losses with the growth of competition in the Omaha MSA. They also attack Qwest's methodologies and market definitions while -- as noted above -- refusing to disclose any hard subscribership data of their own.

Both AT&T and Cox contend that Qwest's competitive quantifications includes data drawn from areas outside Qwest's service territory in the Omaha MSA.[54] As discussed above, they are incorrect. All of the access line data that is presented in Mr. Teitzel's affidavit, including retail and wholesale access line volumes, reflects data exclusively encompassed by the Qwest service territory specified in footnote 3 of Mr. Teitzel's affidavit.

Cox and AT&T state that Qwest's access line losses are overstated because Qwest does not account for Qwest access lines converted to Qwest DSL service, presumably because a second line dedicated to dial-up computer access has been replaced with the DSL technology on the primary line.[55] However, customers do not always remove standard voice lines when ordering DSL service from Qwest. Moreover, the ratio of lines lost to new DSL lines is so small that, even if an assumption is used that all Qwest DSL lines installed in the wire centers in Qwest's Petition between December 2000 and February 2004 result in the removal of a voice

[53] *See* Teitzel Affidavit at 3-25.

[54] *See* Cox at 16-19 *and* AT&T at 7-9.

[55] *See* Cox at 17-18 *and* AT&T at Appendix A to the Selwyn Affidavit.

access line, the inward DSL quantities would only be approximately five percent of the total Qwest retail access line reduction shown at Page 3 of the Teitzel Affidavit.[56]

G. Significance Of VoIP Competition

Cox contends that Qwest "overstates the impact of voice over IP services," and states that customers wishing to replace their local telephone service with VoIP must first purchase broadband service.[57] AT&T attempts to reinforce Cox's contentions by claiming that certain VoIP services listed in the Teitzel Affidavit, such as service offered by Vonage, are not even available in Nebraska or the Omaha MSA.[58] Likewise, McLeod asserts that since VoIP technology is "still in a nascent state" and has a "limited" number of subscribers, VoIP is not a substitute for traditional wireline voice services" and should not be considered when analyzing the level of competition in the Omaha MSA.[59] As shown below, these claims are incorrect.

The dramatic growth on the Internet and all IP-enabled applications, including the IP-Voice service application, is well illustrated in the comments in the Commission's proceeding on IP-enabled services.[60] It need not be repeated here, especially as AT&T's objections seem to focus primarily on the claim that IP voice, because it represents part of the future for American consumers, is irrelevant in assessing whether Qwest's Petition must be granted. The IP-voice application is available to enable broadband customers (*e.g.*, customers of Cox) to engage in

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[56] The span of time between December 2000 and February 2004 is the same period used in the Teitzel Affidavit to calculate the Qwest retail access line decline in the Omaha MSA.

[57] *See* Cox at 20. All of Cox's cable television customers, by virtue of the coaxial cable connection, have a broadband connection. Each of these customers has the option to subscribe to VoIP service, from any current VoIP provider serving the Omaha/Council Bluffs area, as a direct alternative to Qwest local wireline service.

[58] *Id.* at 13.

[59] *See* McLeod at 7.

[60] In the Matter of IP-Enabled Services, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863 (2004).

real-time voice communications as part of their total package of Internet services. To claim that the IP-voice application either is not significant, or that it has no place in a competitive analysis of the Omaha market, is to simply blink reality.

H. Intermodal Competition From Wireless Services

Cox and AT&T both contend that wireless service is not a significant competitive threat to Qwest wireline services in the Omaha MSA.[61] As support for this claim, AT&T cites a statement in the Commission's *Triennial Review Order* that "about three to five percent of CMRS subscribers are using their service as a replacement for *primary* fixed voice wireline service."[62] However, there are two flaws in AT&T's contention.

First, the *Triennial Review Order*'s figure was based on historical information, not current data, and the rate at which subscribers are substituting wireless for wireline service is continually increasing. In fact, the Yankee Group recently released a study of mobile telephone users, and found that, based on a June 2004 survey of 5,510 adult (age 18 and over) respondents in the survey, six percent had "cut the cord" and wireless service was the only telephone service currently being used by this subset, and *an additional 14 percent plan to drop their landline within five years.*[63] Importantly, even the current six percent represents only subscribers that have entirely disconnected wireline telephone service, and does not include any customers who have disconnected a second line in favor of wireless while retaining wireline service for the primary line. Another important finding in the Yankee Group study is that the leading reason customers provide for continuing to retain wireline service is to access the Internet. As wireless

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61 *See* Cox at 19 *and* AT&T at 20.

62 *Id.*

63 *See* 2004 Wireless Consumer Suite: Highlights from Our Mobile User Surveys, The Yankee Group, August 24, 2004, p. 14.

providers continue to expand their Internet access functionality, even this factor will diminish over time.[64]

I. Qwest's Use Of E911 Data To Estimate Competitive Entry

AT&T offers the Declaration of Mark J. Lancaster and Dale C. Morgenstern ("Lancaster and Morgenstern") to reinforce AT&T's contention that the use of E911 record data in estimating the magnitude of competitive entry in the Omaha MSA is not reasonable.[65] At page 5 of their Declaration, Lancaster and Morgenstern state that, even though the "NENA guidelines recommend that carriers not include telephone numbers for classes of service that do not generate dial tone, such as direct inward dial ("DID") numbers," AT&T takes the "conservative" approach and includes all DID numbers in the E911 records it reports to Intrado, the third-party E911 database administrator.[66] This information is provided in an attempt to discredit the E911

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[64] In an article by Dow Jones Newswires, the following finding is cited:

> There are 8 million households that have wireless phones but not wireline. Most of the disconnects appear to be from young, single people. A full 22% of people between ages of 18 and 36 have disconnected a landline, Telephia said. And 11.9% of single people have disconnected, compared with 3% of married people.[64]

The article goes on to state that "single people account for roughly 25% of U.S. households." Further, an article by CNET News states:

> By 2008, nearly a third of all U.S. wireless subscribers won't have a landline phone in their home, according to a forecast released Wednesday by high-tech market research firm Instat/MDR. That's a dramatic increase in what's known as "cord-cutting." Instat/MDR also found that cord-cutting is most popular among young adults, one of any industry's most important customer segments.[64]

[65] It is notable that AT&T does not dispute the fact that CLEC E911 records presented in Qwest's Petition are associated only with facilities-based CLECs serving customers via CLEC-owned switches, and that any lines served via resale or UNE-P purchased from Qwest are entered into the E911 database as Qwest records.

[66] Other carriers, including Qwest, follow NENA [National Emergency Number Association] guidelines and exclude DID numbers from records reported to Intrado. In these

data shown at page 8 of the Teitzel Affidavit to Qwest's Petition.[67] However, Mr. Teitzel clearly stated that "E911 records are not directly equivalent to the number of access lines in service, since some CLECs report [DID] telephone numbers to Intrado (more than one DID number can be associated with a single PBX trunk) and other CLECs do not report telephone numbers associated with inbound-only access lines that are incapable of originating a call to E911."[68] Mr. Teitzel went on to state, "However, the E911 records are a *directional surrogate* for the number of access lines served by facilities-based CLECs."[69] Qwest never claimed that the E911 records stood for anything other than they do -- as a reasonable surrogate on which to assess line loss. AT&T's objection is irrelevant.

J. Facilities-Based Competition

CompTel criticizes Qwest for its statement that, "CLEC competitors include McLeod and AllTel, which are also facilities-based CLECs that serve the Omaha MSA using their own networks, and which have overbuilt Qwest's legacy facilities."[70] CompTel claims that McLeod and Alltel's "use of resale and UNEs purchased from Qwest" means that they are dependent on

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instances, the exclusion of DID lines and numbers from E911 records understates the actual number of physical access lines in service.

[67] The Commission has received and reviewed E911 data as a means of estimating the magnitude of facilities-based CLEC competition in other proceedings. For example, Verizon presented E911 CLEC data in its Section 271 Track A filings with the Commission (*see*, *e.g.*, CC Docket Nos. 01-269 and 02-61 for Pennsylvania and Maine), BellSouth presented E911 data in its Track A filings (*see*, *e.g.*, CC Docket No. 01-277 for Georgia and Louisiana), and Qwest presented CLEC E911 data in support of its Track A filings for each of its 14 states. In no instance was the E911 data presented as a precise measure of facilities-based CLEC competition, but rather, as an estimate of facilities-based CLEC presence (since CLEC E911 listings contain only customer records associated with CLECs using their own local switches to serve customers). Based on the totality of the competitive evidence in these dockets (including the E911 data), the Commission granted Section 271 approval in each state.

[68] Teitzel Affidavit at 7.

[69] *Id.* (emphasis added).

[70] *See* CompTel at 3.

Qwest's network, and therefore cannot be considered facilities-based competitors.[71] CompTel's criticism is misplaced. The term "facilities-based CLECs" encompasses CLECs that utilize their own local switches and their local loop facilities (such as Cox) as well as CLECs that utilize their own switches, their own fiber facilities and loop facilities leased from the ILEC. In its Petition, Qwest does not contend, and does not do so now, that either McLeod or Alltel have "overbuilt" all aspects of Qwest's loop distribution network. However, both CLECs have placed fiber in portions of the Omaha MSA that "overbuild" portions of Qwest's legacy network, primarily for purposes of interoffice transport and carriage of long distance traffic.

Similarly, McLeod disputes its classification in Qwest's Petition as a "facilities-based" CLEC, and claims that Qwest's network has not been overbuilt by competitors.[72] Quite to the contrary, it is clear that McLeod clearly is a facilities-based CLEC, and is currently using McLeod-owned local switching to provide service in the Omaha MSA. As stated in Mr. Teitzel's affidavit, McLeodUSA now has a fiber network that spans 25 states (including Nebraska), and uses these facilities to provide local, long distance, wireless, data and Internet service to both urban and rural areas.[73]

IV. QWEST'S PETITION MEETS ALL THREE ELEMENTS OF THE SECTION 10 FORBEARANCE TEST

In addition to attacking Qwest's data and attempting to substitute their own impairment test, Cox, AT&T, and several other CLEC entities assert that Qwest's Petition does not make

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[71] *Id.* CompTel bases this claim on the fact that McLeod's tariffs "don't reflect that McLeod is serving any customers wholly over its own network or facilities," and that the "Commission has found that Alltel provided CLEC services in Nebraska using UNE loops purchased from Qwest." Qwest believes this is a very weak basis for claiming that McLeod and Alltel are not facilities-based competitors in Qwest's wire centers in the Omaha MSA.

[72] *See* McLeod at 8.

[73] *See* Teitzel Affidavit at 18.

even a "prima facie" case for forbearance under Section 10 of the 1996 Act.[74] Qwest completely agrees that the three-part forbearance test of Section 10(a) is the appropriate legal standard under which its Petition must be judged. It is therefore appropriate to revisit the three-part forbearance test established in Section 10 of the 1996 Act, and review exactly what it requires.

Section 10(a) requires that the Commission "forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets" if the Commission finds that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;[75]
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers;[76] and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[77]

In turn, Section 10(b) provides that in making the public interest determination the Commission must

> consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.[78]

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[74] *See* Cox at 13-23; AT&T at 29-35; MCI at 4-10; Sprint at 11-14; CompTel at 8-19.

[75] *See* 47 U.S.C. § 160(a)(1).

[76] *See* 47 U.S.C. § 160(a)(2).

[77] *See* 47 U.S.C. § 160(a)(3).

[78] *See* 47 U.S.C. § 160(b).

The basis for Qwest's forbearance request is that the Omaha MSA's telecommunications market has now become fully competitive, and that it no longer serves the public interest to continue regulating Qwest as if it were still a dominant carrier. Naturally, the CLECs wish to downplay the actual state of competition in the Omaha MSA, and they urge the Commission to adopt a new, self-serving standard that places CLECs at the center of its forbearance analysis rather than consumers.[79] Specifically, the CLECs demand that the Commission conduct its forbearance analysis based on the "wholesale" market for UNEs and switching rather than the retail marketplace. Not coincidentally, the CLECs claim as a chorus that Qwest has satisfied the "wrong" test by focusing on the retail market. They are incorrect, as a matter of fact, law and precedent[80]

As discussed above, Section 10 ultimately focuses on the consumer interest, not the private interests of individual carriers. It is also the case that in past forbearance proceedings under Section 10(a) that were premised on the competitiveness of end-user markets, the Commission has evaluated whether a carrier is "dominant" and whether it has "market power" based on that carrier's position in the retail marketplace for telecommunications services and facilities rather than focusing on wholesalers and intermediaries.[81] In turn, the Commission's

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79 *See* AT&T at 3, 5-6, 11-12, 14-17, 23-35; Cox at 8, 13-15; MCI at 3, 6, 7; Sprint at 2, 7-11, 16-18; McLeod at 1-2, 4, 8, 9-10; CompTel at 10-14; ALTS at 1-11.

80 *See, e.g., AT&T Corp. v. FCC*, 263 F.3d 729, 736-7 (D.C. Cir. 2001), *citing Committee for Community Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984) *and Tex Tin Corp. v. EPA*, 293 F.2d 1321, 1324 (D.C. Cir. 1991)(overturning Commission dismissal of a forbearance petition for departing from precedent).

81 *See, e.g.*, In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd 3271, 3276-77 (1995)("*AT&T Nondominance Order*")("market power" and the comparative level of competition is evaluated from the retail market for the services); *see also* In the Matter of Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, as Amended et al, *Memorandum Opinion and Order*, 19 FCC Rcd 5211 (2004).

analysis of whether forbearance serves the public interest has always taken a broad view of the market, and has focused on the end users of a carrier's services and facilities -- not on middlemen.[82] It is therefore clear that Section 10 does not require that Qwest focus upon the indirect effects of forbearance on Qwest's competitors, as Cox, AT&T and the other CLECs suggest. Nor does Section 10 require the Commission to consider UNE impairment pursuant to Section 251(d)(2)(B), contrary to what the CLECs claim, and no matter how many times they claim it. Moreover, while some of the CLECs assert that their interests are synonymous those of end-user consumers in the retail marketplace, this is plainly not the case.[83]

Cox, AT&T, and several other CLECs claim that Qwest has anticompetitive motives for seeking forbearance, and they claim that Qwest will use any regulatory relief that is granted to it to put its competitors out of business by shutting off their access to Qwest's network, facilities and services.[84] Qwest's response to these inflammatory and poisonous claims is both simple and direct: Qwest is not seeking to deprive CLECs of access to its network, to its facilities, or to its services in the Omaha MSA. Pointedly, Qwest has not asked that the Commission grant it complete deregulation in the Omaha MSA: it has asked that the Commission forbear from enforcement from the specific resale and unbundling obligations that are required by Section 251(c) of the 1996 Act, as well as the related portions of Section 271 that incorporate these requirements, as well as forbearance from dominant carrier regulation as well as regulation as an ILEC in the Omaha MSA. In contrast, Qwest has not asked that the Commission exempt it from the interconnection, resale and facilities access provisions of Sections 251(a) and 251(b), under

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[82] *See id.*

[83] *See* Cox at 6.

[84] *See id.* at 23-31; AT&T at 2, 6, 34-35; Time Warner at 15; Sprint at 9, 15-16; CompTel at 11, 18, 19; ALTS at 7-8.

which Qwest is obligated to interconnect with its competitors, as well as provide resale under reasonable and nondiscriminatory conditions and provide them with access to rights-of-way.[85] Qwest has also explicitly stated that it intends to continue providing CLECs with access to switching, unbundled access to network elements, and resold services.[86]

Lastly, Cox argues that Qwest has failed to provide evidence that it could be expected to negotiate interconnection agreements with competitors absent rules that require it to do so.[87] This argument borders on being silly. Qwest is under a business-driven imperative to negotiate agreements with wholesale providers, and the legal obligations imposed by Sections 201(a), 211(a) and 251(a) and (b) of the 1996 Act will plainly continue to apply to Qwest if the Commission grants its forbearance request.[88]

V. CONCLUSION

As a matter of law, none of the arguments submitted by those parties opposing Qwest's Petition rebut the evidence that Qwest presented demonstrating that the statutory conditions for forbearance have been satisfied, and that Qwest's Petition should be granted. As a matter of policy, it is also clear that forbearance is justified. Qwest has documented that it is no longer the dominant local exchange provider in the Omaha MSA, and that it is subject to substantial wireline and intermodal competition, all of which competes directly with Qwest's services. In particular, the facilities-based services provided by Cox have completely outstripped those of Qwest in the Omaha MSA's residential market, and are already substantial competition in the business market. There is simply no logical reason to regulate a carrier with a minority market

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85 *See* Petition at 26-27.

86 *Id.* at 26.

87 *See* Cox at 13.

88 *See* attached Supplemental Statement of Strategic Policy Research at 5-6.

share as the dominant monopoly carrier, especially while the true dominant carrier (in this case, Cox) is subject to the very lightest of regulatory burdens. Such a situation is also not sustainable. Qwest has therefore shown that it meets the forbearance tests set forth in Section10(a) and is, accordingly, entitled to grant of its Petition.

Respectfully submitted,

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SUPPLEMENTAL STATEMENT OF JOHN HARING, JEFFREY ROHLFS AND HARRY M. SHOOSHAN

September 17, 2004

1. INTRODUCTION

Qwest has asked us to respond to issues raised in the opposition filings made by several competitive local exchange carriers ("CLECs") and CLEC-related industry organizations concerning Qwest's petition for regulatory forbearance in Omaha, Nebraska. The opposition filed by AT&T Corp. ("AT&T") includes a declaration by Lee L. Selwyn to which we respond in particular.

2. ECONOMICALLY COHERENT REGULATION

As established in Qwest's petition, and as discussed in our earlier comments, Qwest faces substantial competition in the areas it serves in the Omaha Metropolitan Statistical Area ("Omaha MSA"). This competition comes from a variety of service suppliers, and Qwest has lost *more than half* the market to the competition.

We previously noted that economically coherent regulation rests on *both* the existence of a genuine (*i.e.*, serious) market failure and specific identification of efficiency-enhancing market interventions by the government. If there is no market-failure "disease" or the regulatory "cure" is worse than the putative market-failure "disease," regulatory intervention is economically *in*coherent. Our view is that dominant-firm regulation of Qwest in Omaha *is* economically incoherent and its continuation itself a likely source of economic organizational failure.

AT&T and Selwyn allege that the "wholesale" market is not competitive and "dominant-firm" regulation (of Qwest) is, therefore, economically warranted. This position involves at least two logical *non sequiturs*.

First, even if the Omaha MSA's "wholesale" market were not competitive, this would not suffice to demonstrate a market failure. Suppose the restaurant business is competitive in a particular geographic area, but no restaurant offers the use of its kitchen on a wholesale basis. In this case, the "wholesale" market is not competitive (indeed, does not even exist), but there is plainly no market failure because the retail market—the market that *counts* for economic efficiency—*is*, by assumption, competitive.

Second, even if the local retail market were not effectively competitive (a counterfactual in our view), that can only suffice to demonstrate a *potential* for efficiency enhancement through regulatory market intervention. Regulation may make things worse.[1]

Indeed, it is AT&T's position that, even if competition in the Omaha market were *completely effective*, that would not suffice to warrant Qwest's reclassification as economically non-dominant in that market. AT&T's view is that regulation must ubiquitously afford it the means it may wish (but increasingly chooses not) to utilize to compete,[2] notwithstanding the availability of viable alternative means of competing and the economically adverse/perverse effects of the current regulatory regime on investment incentives and achievement of regulatory objectives. This self-interested position is a policy argument, however, not an economic conclusion.

3. COMPETITIVE REALITIES

AT&T and Selwyn claim that wireline subscriber loops are economically essential facilities that cannot be economically replicated. This contention is completely belied by the fact that the local Omaha cable monopolist (not to mention various wireless service operators) has successfully deployed a competing telephone service and *already* captured a large share of the market. The best available data indicate that this competitive success is very substantially in excess of "negligible" and is impossible to square with Qwest's being a genuinely "dominant firm" in economic terms.[3] The cable operator has captured well over *100 thousand* customers in this *local* market and is evidently eminently well-positioned to capture twice as many more.

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1 Consider, for example, that if the "wrong" firm is being regulated as "dominant," regulation is likely to be highly counterproductive. Suppose, for example, the local cable monopoly is the genuine dominant firm in economic terms—after all, it is economically unregulated and its share of the multichannel video market is *far greater* than Qwest's share of local telephony in Omaha. In this case, Selwyn's allegations about anti-competitive cross-subsidization (at & 55) are misplaced; he should be seeking to impose unbundling requirements on the local cable monopoly. Alternatively, suppose regulatory intervention undermines incentives for investment in deployment of competitive facilities and "destroys competition to save it." In this case, the cure is worse than the disease and declassification of Qwest as dominant is economically warranted.

2 AT&T has, of course, announced its reticence to compete using the regulatory means it claims in this proceeding are necessary and it claims (mistakenly in our view) would not exist without governmental compulsion. As we previously noted (and argue again presently), radically altered market conditions call for replacement of anomalous asymmetrical regulation of Qwest with symmetrical regulatory governance that promotes rather than handicaps competition.

3 As we explained in our earlier statement and Haring & Levitz note in their FCC OPP Working Paper No. 25 ("What Makes the Dominant Firm Dominant?"), cited therein, it is the dominant firm's ability to let
(footnote continued)

Notably, AT&T and Selwyn, and Cox (the gigantic cable MSO that operates in Omaha) and the other CLECs quibble about Qwest's market share estimates, but offer no estimates of their own. Without such data, it is hard to give much credence to these complaints, which obscure more than they reveal.

The conclusion that Qwest no longer retains dominant status in the Omaha market is highly *robust* with respect to virtually any plausible variation in share estimates: competitor inroads are *so substantial* that, even were they *much* less, Qwest's share losses would still be impossible to square with its current categorization as economically dominant—it simply cannot be this much "at competitive risk" and in a position simply to ignore its rivals' competitive activities, as is required for economically accurate characterization as a dominant firm.

Indeed, AT&T and Selwyn (as well as Sprint) hold out the specter of duopoly if forbearance is granted, suggesting *not* that the problem is that Qwest in fact, dominant and, therefore, can safely ignore its rivals' competitive activities (*i.e.*, without economic consequence), but rather that the competitive problem is *precisely* potential *recognition of mutual interdependence under oligopoly*. Conditions in the instant operating environment are highly *in*conducive to either tacit or explicit collusion, given the disparate character of the various competitive operators (both actual and potential).[4]

Here we simply note the inconsistency in arguing that Qwest is economically dominant and, simultaneously, that there is a problem of collusion. If Qwest were really dominant, it would not have to collude; it would simply ignore its rivals' activities and optimize its pricing given the "residual" (*i.e.*, "left-over") demand. Moreover, if the potential for collusion is to be minimized, that presumptively calls for a major overhaul of existing asymmetrical regulation—a point we previously made—and replacement by symmetrical deregulatory treatment.

4. ABSENCE OF BARRIERS TO COMPETITION

According to Selwyn (at page 35), supply elasticity for access facilities is "extremely low" and ILECs would, therefore, be able to exercise market power absent classification as a dominant carrier "subject to unbundling requirements with respect [*sic*] bottleneck facilities exhibiting low supply elasticity." As we have noted, this analysis is directly and completely contradicted by the

competitors "do their worst" that *defines* its dominance in economic terms. Economic dominance is a matter of rivals' comparative weakness. In Omaha, Cox Cable is neither comparatively nor absolutely economically weak, having *already* taken very substantial competitive market share from the incumbent and transparently in a position to take even more. Its competitive activities plainly would be impossible for the incumbent to miss or ignore.

4 Reaching and maintaining a collusive equilibrium would be exceedingly difficult in the instant setting, where competing firms rely on a variety of productive technologies to deliver a variety of services.

cable operator's *actual* expansion of its own output (by quite *substantial* amounts relative to market size) in the Omaha market. Contrary to Selwyn's faulty observation, the supply elasticity is, demonstrably and quite evidently, *extremely high* in Omaha. The alleged supply inelasticity of alleged "bottleneck facilities" is, in fact, completely irrelevant because the alleged bottleneck facilities are transparently *not* bottlenecks.

In our comment, we specifically addressed the issue of alleged economically essential facilities, noting that economies of *scope* produced by the ability of many applications to "ride" on any necessary dedicated or shared facilities with many technologies (cable, electric power, *etc.*) could well mitigate the importance of any scale economies. We also noted that wireless technologies often do not entail heavy use of dedicated facilities (*i.e.*, there is greater effective network-resource sharing), rendering economies of scale associated with use of dedicated facilities insignificant as competitive barriers in these cases.

Note also that with rising incomes and the growth of consumer demand for Internet access, individual residence telecommunications demands now frequently *exceed* a single access line. There is thus increasingly "room" for more than one service supplier and consumers increasingly rely on multiple suppliers to meet their interactive communications requirements (*cf.* the common situation where a household acquires telephone service from the telephone company and Internet access from a different supplier). Finally, we would point out that, even in the case where demand is satisfied by a single line, this by no means precludes competition for the right to supply that single line. So-called "franchise competition" may well often permit competition even where demands are limited and deployment of multiple facilities is uneconomic.[5]

According to Selwyn (at page 44), these "speculations" of ours "do not a competitive market make." His problem is that ours are not simply "speculations." As noted above, the cable operator in Omaha has *already* taken a very substantial share of the market by supplying a telephone service that "rides" quite economically effectively on its cable network facilities. According to Selwyn, this type of competition offers no relief for "CLECs whose business models do not happen to comport precisely with this vision." But this is not the economic test of whether a market is competitive. Indeed, it appears to be a policy argument. What AT&T and Selwyn seem to be saying is that if a CLEC such as AT&T wants to compete using a particular set of facilities, or a particular set of technologies, then Qwest should be obliged to support that choice, and to continue to provide AT&T with these facilities even if the market is otherwise competitive. Why the FCC should promote particular business models or competitors as opposed to effective competition and maximum economic welfare is by no means clear. On Selwyn's and AT&T's view, regulation is apparently simply a good supplied by the government to meet the demands of certain private enterprises to ensure their success *on whatever terms they dictate*, no matter what the consequences for good governance or the commonweal.

5 Such competition will be more feasible, the greater the associated "bundle" of services being offered.

While Selwyn cites Professor Landis and Judge Posner's famous *Harvard Law Review* article on "Market Power in Antitrust Cases," (as we earlier did, as well), in discussing the competitive import of wireless telephony (at & 63), he simply ignores their discussion of the proper analysis of competitive substitutes to which we referred at length in our earlier submission. Our view is that the fact that not all users regard wireless as a close substitute does not suffice to "exclude" wireless offerings from the economically relevant market—the available evidence indicates that a *competitively significant number* of consumers have already switched and that more *would* switch (given a change in relative terms of trade), which is all that is required for inclusion within economically relevant market boundaries. Selwyn claims that wireless is not economic, but in fact the large and rapidly increasing volume of wireless calling plainly implies that wireless calling is in a great number of cases *more economic* than wireline calling—if it were not, it would not occur.[6]

Landis & Posner's point is that, even if one excluded certain services from a defined market on grounds of insufficiently close substitutability, that would not end the analysis. Indeed, their exclusion implies that there are a larger number of competitive alternatives at the edge of the market and potential competition is thus likely a more formidable force.[7]

5. EFFECTS OF REGULATION

AT&T and Selwyn assert that, without continued government compulsion, the supply of telecommunications service offerings that rely on Qwest service inputs will all disappear. In other words, their contention is that competition *only* occurs because of government compulsion, and cannot survive without compulsion even once it is well-established at the retail level. The vast majority of economic transactions, of course, occur without governmental compulsion because exchange is mutually beneficial to the transacting parties. The AT&T/Selwyn position thus amounts to an assertion that Qwest, absent government compulsion, would *never* find it in its own economic self-interest to transact business with suppliers of potentially economically complementary resources, in particular, no matter how much foregone economic profit this might entail.

Several points are worth noting with respect to this implausible contention. First, it is simply not reasonable, indeed, it strains credulity to argue that a profit-seeking enterprise will systematically forego opportunities to earn substantial profits; to presume otherwise entails a fundamental

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6 Selwyn's view that a higher price belies economic substitutability involves a rudimentary economic error—failure to consider price in relation to value. Higher-value service may well be preferred, not withstanding a higher price.

7 Inclusion produces a lower market share but less potential competition since more suppliers are "inside;" exclusion produces a higher market share, but greater prospects for potential competition since more suppliers are "outside" the market.

contradiction in terms; precisely *because* it wishes to maximize profits, the incumbent has incentives to lease its productive capabilities to whomever can put them to the most valuable uses.[8]

Second, it is, likewise, disingenuous to ignore obvious strategic considerations that would lead the incumbent telephone network operator to offer access to its productive facilities at economically attractive terms. An incumbent may well wish to afford potential deployers of competitive network facilities economic incentives to utilize the incumbent's facilities and, thereby, to allow it to realize economies of scale and scope.

Third, as we noted in our earlier statement, the great debates of recent years about unbundled elements concern the terms and conditions under which resale occurs, *not* the principle of resale. Perceivedly confiscatory terms and conditions naturally prompt opposition and grudging compliance. In addition to adverse effects on the regulated firm's investment incentives, the current regime also discourages investments by new entrants in competing facilities deployments.

Fourth and finally, we note that forbearance from dominant-firm regulation in Omaha does not insulate Qwest from its responsibilities and requirements to behave reasonably under the Communications Act.

6. GOOD SYMMETRY

Firms such as AT&T, which are the beneficiaries of the current asymmetrical regulatory regime, not surprisingly favor its continuation, no matter how significant the changes in supply and demand conditions that make it so economically ludicrous to categorize Qwest as a dominant firm in the Omaha MSA. In the long-distance market, where AT&T was once the dominant firm, its rivals also favored continuation of asymmetrical regulation of AT&T, notwithstanding AT&T's substantial losses of market share and competitive deployment of huge amounts of excess network capacity, as long as regulatory burdens did not apply to them. *Very* soon after the end of the old asymmetrical regime and the imposition of symmetrical regulatory requirements in long distance, a consensus developed calling for prompt deregulation, which then came to pass. This suggests a tack for fomenting deregulatory pressure: how long would Cox favor maintenance of Qwest's dominant status in Omaha if the same regulatory requirements were imposed on it? A better way would be to move directly to implement the deregulatory reforms that are plainly warranted by the competitive conditions now prevailing in the Omaha MSA's telecommunications market.

[8] This was, of course, one of Adam Smith's (many) great insights: it is not benevolence, but enlightened self-interest that leads the butcher, the baker and the candlestick maker to engage in productive enterprise.

7. CONCLUSION

Repeated judicial misgivings about excessive regulatory designations of private productive capacity as competitively essential reflect concerns about harmful dissipation of economic investment incentives. Specifically, the expropriation of private property through various "sharing" requirements usually operates to reduce incentives to invest in such property and thereby reduce economic welfare. In the telecommunications context, adverse consequences for investment in new and innovative network facilities deployment have been exacerbated by the regulatory specification of exceedingly generous terms and conditions for access to network supply capabilities. Why bother to make what the government allows you to buy more cheaply?

It is thus important to weigh benefits and costs carefully and judiciously in setting appropriate sharing requirements. Where expected benefits from sharing requirements are small, either because sharing arrangements would likely be negotiated without governmental compulsion (and thus are not needed and would undermine effective commercial transactions) or because such arrangements are not needed to ensure effective competition, the case for imposing sharing requirements is weak as costs (in terms of foregone investment) loom larger relative to benefits.

As we argued in our earlier submission, competitive conditions in Omaha supply a clear case for revision of the incumbent telephone company's dominant status. If not here, where? If not now, when?

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the FCC via its Electronic Comment Filing System, 2) served via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc., and 3) served via First Class United States mail, postage prepaid on the parties listed on the attached service list.

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